

FILED

08 MAY 14 PM 3:42

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

JAMES F. CLAPP (145814)  
J. KIRK DONNELLY (179401)  
MARITA MURPHY LAUNGER (199242)  
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DOSTART CLAPP GORDON & COVENEY,  
LLP, a limited liability partnership,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
LABOR, ELAINE L. CHAO, in her official  
capacity as Secretary of Labor, and DOES 1  
through 20, inclusive,

Defendants.

CASE NO. **08 CV 0863 JM AJB**

COMPLAINT FOR VIOLATION OF THE  
FREEDOM OF INFORMATION ACT  
(5 U.S.C. § 552)

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 to compel the production and release of agency records requested by plaintiff from the U.S. Department of Labor.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). Venue lies in this District under 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff Dostart Clapp Gordon & Coveney, LLP is a California limited liability partnership located in San Diego County, California.

4. Defendant United States Department of Labor ("DOL") is an executive Cabinet Department of the Executive Branch of the United States Government. DOL is an agency within the meaning of 5 U.S.C. § 552(f).

1           5. Defendant Elaine L. Chao is the Secretary of Labor and heads the DOL.

2           6. On November 27, 2006, the DOL issued an opinion letter (FLSA2006-43) regarding  
3 whether certain "registered representatives" in the financial services industry qualify for the  
4 administrative exemption under Section 13(a)(1) of the Fair Labor Standards Act and 29 C.F.R. Part  
5 541.

6           7. On November 29, 2006, plaintiff sent a FOIA request to Paul DeCamp, Administrator  
7 of the Wage and Hour Division of the DOL, requesting copies of all documents which led to the issuance  
8 of opinion letter FLSA2006-43. A true and correct copy of plaintiff's FOIA request is attached hereto  
9 as Exhibit 1. Plaintiff sent the FOIA request via U.S. Mail and by facsimile, as required under 29 C.F.R.  
10 § 70.19(a).

11           8. Plaintiff's FOIA request sought production of the following: (1) all documents reflecting  
12 any oral or written communications between any representative of the Securities Industry Association  
13 (also known as the Securities Industry and Financial Markets Association) ("SIA") and DOL concerning  
14 whether registered representatives, account executives, broker-representatives, financial executives,  
15 financial consultants, financial advisors, investment professionals, and stockbrokers (collectively  
16 referred to as "registered representatives") in the financial services industry are exempt from the  
17 overtime pay requirements of the Fair Labor Standards Act ("FLSA"); (2) any and all documents in any  
18 way related to the SIA's request for an opinion letter from the DOL concerning whether registered  
19 representatives are exempt from the overtime pay requirements of the FLSA; (3) any and all documents  
20 provided by the SIA to the DOL in connection with the SIA's request for an opinion letter from the DOL  
21 concerning whether registered representatives are exempt from the overtime pay requirements of the  
22 FLSA; (4) any and all documents reviewed or relied upon by the DOL in formulating its response to any  
23 request for an opinion letter from the SIA concerning whether registered representatives are exempt from  
24 the overtime pay requirements of the FLSA; and (5) any and all documents in the possession of the DOL  
25 relating to any lawsuit alleging that registered representatives are entitled to overtime pay under the  
26 FLSA, including without limitation any documents relating to lawsuits against A.G. Edwards & Sons,  
27 Inc., Wachovia, Prudential, Merrill Lynch, Morgan Stanley, Citigroup/Smith Barney, UBS, Edward  
28 Jones, and/or Banc of America.

1           9.       In violation of 5 U.S.C. § 552(a)(6)(A)(i) and 29 C.F.R. § 70.25(a), defendants failed to  
2 determine within 20 days after receiving plaintiff's request whether to comply with the request and failed  
3 immediately to notify plaintiff of such determination and the reasons therefor. To date, defendants have  
4 failed to produce a single document in response to plaintiff's request.

5           10.      No "unusual circumstances" existed under 5 U.S.C. § 552(a)(6)(B) to extend the 20-day  
6 deadline established under 5 U.S.C. § 552(a)(6)(A)(i), and in any event: (a) defendants failed to give  
7 plaintiff written notice of any need for an extension, and (b) more than 10 working days have elapsed  
8 since the defendants' response was originally due.

9           11.      No "exceptional circumstances" existed under 5 U.S.C. § 552(a)(6)(C) to excuse  
10 defendants' failure to comply with the FOIA, and defendants have not exercised due diligence in  
11 responding to plaintiff's request.

12           12.      In an effort to avoid the need to file this lawsuit, plaintiff contacted the DOL several times  
13 to inquire about the status of its FOIA request:

14               a.       On January 25, 2007, plaintiff telephoned Brad Sinkovic, the FOIA Coordinator  
15 at the DOL. Mr. Sinkovic advised plaintiff that its request had been received and was being processed.

16               b.       On February 6, 2007, plaintiff spoke to Mr. Sinkovic again by telephone.  
17 Mr. Sinkovic advised plaintiff that the DOL was behind in processing FOIA requests, but that the DOL  
18 would respond to plaintiff's request by February 8, 2007.

19               c.       Defendants failed to respond to plaintiff's request by February 8, 2007. Over the  
20 next six weeks, plaintiff attempted to contact Mr. Sinkovic several times, but he did not return plaintiff's  
21 telephone calls.

22               d.       On March 20, 2007, plaintiff telephoned Barbara Bingham, the DOL's "FOIA  
23 Liaison." Ms. Bingham advised plaintiff that the DOL's response to plaintiff's FOIA request was "on  
24 the desk of the Clearance Department waiting for approval" and would be sent out promptly.

25               e.       Having received nothing from the DOL, on November 14, 2007, plaintiff again  
26 called Ms. Bingham. Ms. Bingham said that she was unable to determine a release date for the DOL's  
27 response to plaintiff's request. She suggested calling Michael Ginley, the Director of the Office of  
28 Enforcement.

1 f. On or about November 14, 2007, plaintiff telephoned Mr. Ginley. Mr. Ginley  
2 told plaintiff he would check on the status of plaintiff's request and call plaintiff back. To date, Mr.  
3 Ginley has not called plaintiff back.

4 13. It has been 17 months since plaintiff sent its FOIA request to the DOL. Defendants have  
5 acted arbitrarily and capriciously in failing to respond to plaintiff's request within the statutory deadlines.

6 14. Under 5 U.S.C. § 552(a)(6)(C)(i), by virtue of defendants' failure to comply with the  
7 FOIA's time limits, plaintiff is deemed to have exhausted its administrative remedies.

8 15. Pursuant to 5 U.S.C. § 552(a)(6)(E), plaintiff is entitled to its reasonable attorney's fees  
9 and costs.


10 WHEREFORE, plaintiff prays for the following relief against defendants:

- 11 1. For an order compelling defendants to produce the requested documents to plaintiff;  
12 2. For a finding that defendants acted arbitrarily and capriciously in failing to respond to  
13 plaintiff's request;  
14 3. For reasonable attorney's fees and costs of suit; and  
15 4. For such other relief as the Court deems proper.

16  
17 Dated: May 13, 2008

DOSTART CLAPP GORDON & COVENEY, LLP

18  
19 By:

  
20 JAMES F. CLAPP  
Attorneys for Plaintiff  
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TELEPHONE: (858) 623-4200  
FAX: (858) 623-4299

J. KIRK DONNELLY  
DIRECT DIAL 858-623-4275  
E-MAIL: KDONNELLY@SDLAW.COM

November 29, 2006

***Sent by facsimile and U.S. Mail***

U.S. Department of Labor  
Paul DeCamp, Administrator  
Employment Standards Administration  
Wage and Hour Division  
200 Constitution Avenue, NW  
Washington, DC 20210  
Attention: FOIA Request

Re: Freedom of Information Act Request

Dear Mr. DeCamp:

This is a request under the Freedom of Information Act.

I request that a copy of the following documents be provided to me:

1. Any and all documents reflecting any oral or written communications between any representative of the Securities Industry Association (also known as the Securities Industry and Financial Markets Association) ("SIA") and the U.S. Department of Labor ("DOL") concerning whether registered representatives, account executives, broker-representatives, financial executives, financial consultants, financial advisors, investment professionals, and stockbrokers (collectively referred to as "registered representatives") in the financial services industry are exempt from the overtime pay requirements of the Fair Labor Standards Act ("FLSA"). For the purposes of this FOIA request, the term "document" is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and/or the Federal Rules of Evidence and shall include any writing or recorded matter of every kind or description, however produced or reproduced, whether in draft or final, original or reproduction, in custody or control of you or known by you to have been created, including but not limited to: letters, correspondence, memoranda, notes, emails, minutes of meetings, contracts, agreements, transcripts, reports, photographs, tape recordings, videotapes, audio tapes, films, drawings, graphs, charts, monthly statements, electronic data, discs or other magnetic storage devices, faxes, electronic file notes and correspondences, telephone logs and

EXHIBIT 1



U.S. Department of Labor  
November 29, 2006  
Page 2

memoranda, printouts, or statements. Document also includes any summarization, compilation, or reproduction of documents. Document also means a copy where the original is not in your possession or custody and means every copy of every document where such copy is not an identical copy or the original. Document also includes any writings, records, photographs, or duplicates as those terms are defined in Federal Rule of Evidence 1001.

2. Any and all documents in any way related to the SIA's request for an opinion letter from the DOL concerning whether registered representatives are exempt from the overtime pay requirements of the FLSA.

3. Any and all documents provided by the SIA to the DOL in connection with the SIA's request for an opinion letter from the DOL concerning whether registered representatives are exempt from the overtime pay requirements of the FLSA.

4. Any and all documents reviewed or relied upon by the DOL in formulating its response to any request for an opinion letter from the SIA concerning whether registered representatives are exempt from the overtime pay requirements of the FLSA.

5. Any and all documents in the possession of the DOL relating to any lawsuit alleging that registered representatives are entitled to overtime pay under the FLSA, including without limitation any documents relating to lawsuits against A.G. Edwards & Sons, Inc., Wachovia, Prudential, Merrill Lynch, Morgan Stanley, Citigroup/Smith Barney, UBS, Edward Jones, and/or Banc of America.

In order to help to determine my status to assess fees, you should know that I am affiliated with a private company and am seeking information for use in my company's business.

I am willing to pay fees for this request up to a maximum of \$250. If you estimate that the fees will exceed this limit, please inform me first.

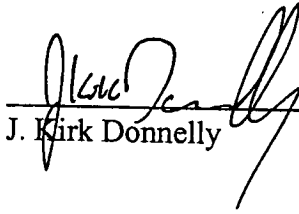
Thank you for your consideration of this request.

Sincerely,  
DOSTART CLAPP GORDON & COVENEY, LLP



J. Kirk Donnelly

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States of America on the 29 of November, 2006.



J. Kirk Donnelly

EXHIBIT 1

**UNITED STATES  
DISTRICT COURT**  
SOUTHERN DISTRICT OF CALIFORNIA  
SAN DIEGO DIVISION

**# 150901 - MB  
\* \* C O P Y \* \*  
May 14, 2008  
15:46:24**

**Civ Fil Non-Pris**

USAO #: 08CV0863 CIVIL FILING  
Judge..: JEFFREY T MILLER  
Amount.: \$350.00 CK  
Check#.: BC30354

**Photocopies**

USAO #: COPIES  
Qty....: 6 @ \$0.50  
Amount.: \$3.00 CK  
Check#.: BC30354

**Total-> \$353.00**

FROM: DOSTART CLAPP GORDON &  
COVENEY, LLP VS US DEPT OF  
LABOR, ET AL



JS 44 (Rev. 12/07)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

DOSTART CLAPP GORDON & COVENEY, LLP,  
a limited liability partnership

## DEFENDANTS

UNITED STATES DEPARTMENT OF LABOR  
ELAINE L. CHAO, in her official capacity as Secretary of Labor,  
and DOES 1 through 20, inclusive

(b) County of Residence of First Listed Plaintiff San Diego  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

DEPUTY

(c) Attorney's (Firm Name, Address, and Telephone Number)

James F. Clapp (145814)  
Dostart Clapp Gordon & Coveney, LLP  
4370 La Jolla Village Drive, Suite 970  
San Diego, CA 92122  
Tel: (858) 623-4200

'08 CV 0863 JM AJB

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☒ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus—Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities—Employment <input type="checkbox"/> 446 Amer. w/Disabilities—Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
5 U.S.C. Section 552

Brief description of cause:

Violation of Freedom of Information Act

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
May 13, 2008

FOR OFFICE USE ONLY

RECEIPT # 1509101 AMOUNT \$350- APPLYING IFP                      JUDGE                      MAG. JUDGE